(19)

IN THE

Supreme Court of the United States

October Term 1944

No. [redacted] 106

CLARENCE ARTHUR LANE,
PETITIONER,

vs.

UNITED STATES OF AMERICA
RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

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AUTHORITIES CITED

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

I.

THE OPINION

The petitioner herein, by a Petition for Writ of Certiorari, seeks a review of a Judgment and Opinion of the United States Circuit Court of Appeals for the Fifth Circuit, which Opinion and Judgment is found in the record on pages 48 to 51. Copy of the Opinion is a part of the Appendix, marked Exhibit A, and attached to the petition herein. Said Judgment and Opinion is an

affirmance of judgment and sentence imposed against petitioner by the United States District Court for the Southern District of Florida, which judgment is set out in the record at pages 5-8, inclusive.

II.

STATEMENT OF GROUNDS UPON WHICH THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOLVED

This statement is set out in the accompanying Petition under Part III, which is hereby adopted and made a part of this brief by reference.

III.

STATEMENT OF THE CASE

A concise statement of the case, containing all that is material to the consideration of the questions presented, is set out in the accompanying petition under Part I, which is hereby adopted and made a part of this brief by reference.

IV.

SPECIFICATION OF ERRORS TO BE URGED

This specification is set out in the accompanying petition under Part IV, which is hereby adopted and made a part of this brief by reference.

V.

ARGUMENT

Summary of Argument

Point 1. The search of petitioner's home and the

seizure of articles therein and their later introduction in evidence against petitioner in a criminal prosecution was an invasion of petitioner's constitutional rights under the Fourth and Fifth Amendments.

Point 2. The trial court should have required the government to show its legal authority for seizing the articles at petitioner's home before permitting the same to be introduced in evidence against him, notwithstanding petitioner's counsel at the trial failed to object thereto, inasmuch as the same involved a fundamental right of petitioner guaranteed by the organic law.

Point 1.

The search of petitioner's home and the seizure of articles therein and their later introduction in evidence against him in a criminal prosecution was an invasion of petitioner's constitutional rights under the Fourth and Fifth Amendments.

The Fourth Amendment to the Constitution, being a part of the Bill of Rights, guarantees that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, * * * ."

Such fundamental right must be liberally construed to preserve the citizens' right to immunity from unreasonable search. *Grau* vs. *U. S.*, 287 U. S. 124; see also *Go-Bart Importing Co.* vs. *U. S.*, 282 U. S. 344. This amendment stems from the principle of the common law securing to every citizen in his home and office immunity from unreasonable interference by official authorities.

In *Gildrie* vs. *State*, 94 Fla. 134, 113 So. 704, it was flatly stated by the Supreme Court of Florida that:

> "The search of a private dwelling without a warrant is, within itself, unreasonable and abhorent to our laws."
>
> (See also *Brown* vs. *State* 98 Fla. 871, 124 So. 467)

The leading cases heretofore decided by this Court on the general subject of the right of the citizen to be immune from unreasonable search of his home or place of business are as follows, and are so well known and so firmly established as not to require quotation therefrom here:

Boyd vs. *U. S.*, 116 U. S. 616.

Adams vs. *N. Y.*, 192 U. S. 585.

Weeks vs. *U. S.*, 232 U. S. 382.

Amos vs. *U. S.*, 255 U. S. 313.

Silverthorne Lumber Co. vs. *U. S.*, 251 U. S. 385.

Gouled vs. *U. S.*, 255 U. S. 298.

Agnello vs. *U. S.*, 269 U. S. 20.

The failure of the government to produce in evidence the search warrant which they purportedly had obtained to search petitioner's home left the case in the same category as if the search had been made without a warrant.

Where it appears that the articles offered in evidence have been unlawfully seized, the Court is required to exclude them. *State* v. *Gunkel*, 188 Wash. 528, 63 P. (2d) 376.

Seizure of the articles at Petitioner's home cannot be sustained upon the theory that the seizure was incident to the arrest of petitioner. At that time petitioner had not been arrested. Nor can the seizure be justified because the officers claimed they had taken out a warrant for his arrest. The warrant itself was not put in evidence and even if it had it could not provide a subterfuge for an exploratory search of his home and its surroundings.

Last but not least, the officers did not have, so far as the evidence shows, facts within their knowledge which would be legally sufficient to authorize the issuance of a valid search warrant to search his home. The second clause of the Fourth Amendment provides that:

> "No Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The still site was many miles from Petitioner's home. There was nothing found at the still connecting petitioner's home with the still or any article or articles in petitioner's home with the still or the operation thereof. Even if the officers had positively identified petitioner at the still, such would be no valid ground for a search of his home unless the officers had independent knowledge, not shown here to exist, that there were specifically named articles in petitioner's home which were subject to seizure. A warrant of arrest, or a right to arrest, cannot provide a basis for a valid search of the accused's home, especially where the officers do not have knowledge of such facts which would authorize the issuance of a search warrant to search the home.

Point 2.

The trial court should have required the government to show its legal authority for seizing the articles at petitioner's home before permitting the same to be introduced in evidence against him, notwithstanding petitioner's counsel at the trial failed to object thereto, inasmuch as the same involved a fundamental right of petitioner guaranteed by the organic law.

It was argued by government counsel that appellant is foreclosed from challenging the validity of the search or the right to introduce the articles seized because his counsel failed to object thereto when offered. It is of course the general rule that timely objections to inadmissible testimony should be made when the same is offered. But where fundamental rights specifically set forth as a part of the organic law is concerned, courts are not irrevocably bound by such mere rule of evidence. Such is definitely indicated by the Opinion of this Court in the case of *McNabb* vs. *U. S.*, 318 U. S. 332, wherein the conviction of petitioners in that case of murder of a Federal officer was reversed because of admission in evidence of evidence in violation of constitutional provisions. In the court of the opinion, Mr. Justice Frankfurter stated:

> "But where, in the course of a criminal trial in the federal courts, it appears that evidence has been obtained in such violation of legal rights as this case discloses, it is the duty of the trial court to entertain a motion for the exclusion of such evidence and to hold a hearing, as was done here, to determine whether such motion should be granted or denied."
>
> (Citing *Gouled* vs. *U. S.*, Supra; *Amos* vs. *U. S.*, Supra; *Nardone* vs. *U. S.*, 308 U. S.338).

In the McNabb case the particular evidence not con-

stitutionally obtained was a confession. There was an objection made to the introduction of the confession but only upon the ground that it had not been shown to have been made voluntarily. No other ground was urged and the hearing by the lower court upon such motion (referred to by Mr. Justice Frankfurter in the quotation above) was a hearing solely touching the voluntariness of the confession. The issue was decided as a matter of law against McNabb and the proffered evidence admitted over the objection upon the ground stated. The conviction was upheld by the Circuit Court of Appeals but upon certiorari this Court deemed itself not bound by the limitation of the objection made in behalf of McNabb at the trial. In Mr. Justice Reed's dissenting opinion this precise observation was made in the following language:

> "Objection to the introduction of the confessions was made only on the ground that they were obtained through coercion. This was determined against the accused both by the court, when it appraised the fact as to the voluntary character of the confessions, preliminarily to determining the legal question of their admissibility, and by the jury. The court saw and heard witnesses for the prosecution and the defense. The defendants did not take the stand before the jury. The uncontradicted evidence does not require a different conclusion."

But the majority (all Justices except Justice Reed) went beyond the question of the voluntariness of the confessions and in fact passed it by without consideration. It was held that the confessions were wrongfully admitted in evidence because McNabb and the others had not been taken before a U. S. Commissioner immediately upon being arrested, in conformity with Federal Law and that because thereof statements made by them could not be lawfully received in evidence against

them. Such holding by this Court would seem to be clearly indicative of the proposition that, where fundamental constitutional rights are involved, mere technical rules of evidence must give way if they tend to obstruct the exercise by the citizen of his constitutional privileges.

As a further indication and tendency of this Court to look beyond the mere forms and procedural niceties in trials and to delve into and scrutinize with care the very heart and substance of the case to ascertain whether or not the accused received a fair trial and his constitutional rights protected, the case of *Malinski* vs. *the People of the State of New York,* 65 S. Ct. 781, is an eloquent testimonial. That case involved a conviction in a State Court of New York and was reviewed by this Court under the narrow limitations of the due process clause of the 14th Amendment. However, extensive observation was made by this Court with reference to the kind of trial which even the States accord their citizens in their own State Courts under the Federal Constitution. The Fourth to Seventh headnotes in this case are significant:

> "4. Where conviction in state court is before federal Supreme Court for review under a claim that a right protected by the Fourteenth Amendment has been denied, the question is not whether the record discloses an infraction of one of the specific provisions of the first eight amendments, but whether defendant was deprived of the due process of law by which he was constitutionally entitled to have his guilt determined.
>
> "5. Judicial review of the guaranty of due process imposes on the Federal Supreme Court an exercise of judgment upon the whole court of proceeding to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking

peoples even toward those charged with the most heinous offenses.

"6. The judicial judgment in applying the due process clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncracies of a mere personal judgment, and an important safeguard against such merely individual judgment is an alert deference to the judgment of the state court under review, but there cannot be blind acceptance even of such weighty judgment without disregarding the historic function of civilized procedure in the progress of liberty.

"7. In reviewing a criminal conviction in a state court, the Federal Supreme Court must be mindful of the responsibilities of the state for the enforcement of criminal laws and exercise with due humility the merely negative function in subjecting the convictions from state courts to the very narrow scrutiny which the due process clause of the Fourteenth Amendment authorizes, and on the other hand no ear must be given to the loose talk about society being at war with the criminal if by that it is implied that the decencies of procedure which have been enshrined in the Constitution must not be too fastidiously insisted upon in the case of wicked people."

Present counsel for petitioner before this Court was not of counsel at his trial in the District Court and probably would have made objections to the introduction of the seized articles at the time they were offered at the trial. However, it is earnestly contended that fundamental rights of the citizen under the Constitution should not be bartered and frittered away just because of the temporary lapse of trial counsel, but that the doctrine many times announced by this Court to the effect that the trial court at all times zeaously guard the rights of the accused to the end that his fundamental rights be protected should be given substance and validi-

ty. This could be accomplished by the principle being laid down by this Court that before articles admittedly seized in the home of a citizen may be used in evidence in a criminal prosecution, the trial court should require the government to show that such search of the home and seizure of the articles therein was lawful under the Fourth Amendment. To permit less than this would in effect be an invasion of the accused's rights under the Fifth Amendment forbidding compulsory self-incrimination.

A number of Federal cases are authority for the proposition that the Court has the power on its own motion to correct on the face of the record errors which show flagrant disregard of the constitutional rights of the citizen, even though no objection or exception be made or preserved. In *McNutt* vs. *United States,* 267 Fed. 670, is was said:

> "While it is the general rule that objections and exceptions are necessary to entitle a party to review the judgment, in criminal cases, where the life or liberty of a citizen is at stake, the courts of the United States, in the exercise of a sound discretion, may notice and relieve from radical errors in the trial, which appear to have been seriously prejudicial to the rights of defendant, although the questions they present were not properly raised or preserved by objection, exception, request or assignment of error."

And in *Humes* vs. *United States,* 182 Fed. 485, it was held:

> "A federal appellate court may consider a case in which the personal liberty of the defendant is involved, notwithstanding the insufficiency of the exceptions taken."

In *Van Gorder* vs. *United States,* 21 Fed. (2d) 939, it was said:

> "In criminal cases, federal appellate Courts may correct serious trial errors, though not challenged by motions."

See to the same effect *Peter* vs. *United States,* 23 Fed. (2d) 659. And in *Chavez* vs. *United States,* 23 Fed. (2d) 305, it was held:

> "Assignments that charge was argumentative, and that Court erroneously summed up evidence, may be considered, though no exceptions were saved."

In the Chavez case a review of the ruling made by the Circuit Court of Appeals was sought by the Government in this Court but certiorari was denied, 48 S. Ct. 588, 277 U. S. 591, 72 L. Ed. 1003. And in *Davis* vs. *United States,* 9 Fed. (2d) 826, it was stated:

> "In criminal cases involving accused's life or liberty, appellate courts, in interest of just enforcement of law, may correct serious trial errors fatal to accused's rights, though not challenged or reserved by objections, exceptions, or assignments of error."

The above rules have been further stated and applied in *Lamento* vs. *United States,* 4 Fed. (2d) 901; *Wyborg* vs. *United States,* 163 U. S. 632, 16 S. Ct. 1127, 41 L. Ed. 289; *Clyatt* vs. *United States,* 197 U. S. 207, 25 S. Ct. 427, 49 L. Ed. 726. Many other cases are cited in the opinions of the foregoing cases, particularly the Lamento case. The same holding was applied in *Savage* vs. *United States,* 270 Fed. 14, and when an appeal was sought to be taken by the government, certiorari was denied by this Court, 42 S. Ct. 54, 257 U. S. 644, 66 L. Ed. 413. Additional cases are *Colbaugh* vs. *United States,* 15 Fed. 929, where it was held that the "Circuit Court of Appeals may consider sufficiency of evidence to show guilt sua sponte" though not raised by any motion, objection or

exception. (*Schwartz* vs. *United States,* 10 Fed. (2d) 900, *Echikovitz* vs. *United States,* 25 Fed. (2d) 864).

In *Boyett* vs. *United States,* 48 Fed. (2d) 482, the record disclosed that during the entire progress of the trial in the United States District Court for the Southern District of Florida, there was not a single objection, exception or motion made by defense counsel during the trial. This fact the trial Judge so certified in his certificate settling the Bill of Exceptions, incorporated in the transcript filed in the appellate court. Notwithstanding all this, the Circuit Court of Appeals did consider all of the points raised upon appeal as to erroneous admission of evidence, erroneous instructions to the jury by the Court and the general insufficiency of the evidence to convict. The case was reversed upon such showing of error, notwithstanding the failure of objections by defense counsel, the Circuit Court of Appeals observing that authority to consider plain error on the face of the record was vested to that Court under Rule 24 and otherwise, even though technically not properly preserved or raised.

CONCLUSION

Petitioner respectfully submits that:

(a) Search of petitioner's home and seizure of the articles therein violated petitioner's rights under the Fourth and Fifth Amendments.

(b) The introduction of such articles so seized as aforesaid violated petitioner's rights under the Fifth Amendment.

(c) The full realization of petitioner of his rights under the Constitution should not necessarily be meas-

ured by the diligence of his trial counsel, inasmuch as at least a corresponding duty devolved upon the trial court to see that his fundamental rights were protected.

(d) The points involved in this case are fundamental and are such as call for the exercise of this Court's power of supervision.

Respectfully submitted,

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EXHIBIT A

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions

Fourth Amendment to the Constitution of the United States:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment to the Constitution of the United States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutes

While this prosecution was grounded upon alleged violation of certain of the Internal Revenue Laws, yet there is no question herein presented or contended for which would necessitate consideration of such statutes, hence they are not herewith included. The sole question raised herein involves the application of the aforesaid Constitutional Amendments.